United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

76-7073/74

To be argued by
DONALD F. MOONEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

MMI LTD. and INTERCAMBIO COMERCIAL KATZ & ARSARAZ, S.A.,
Plaintiffs-Appellants,

v.

PERACO CHARTERING CORPORATION,
Defendant-Appellee.

STALCO INTERNATIONAL CORPORATION,
Plaintiff-Appellant,

v.

FINANCIAL ENTERPRISES OF THE BAHAMAS, LTD., HESNES SHIPPING, S.A. AND, PER ARNSTEIN ARNEBERG,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals
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Plaintiffs-Appellants,

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Introduction

The tone of appellants' brief portrays appellants as the victims of an unforgiving system that has squeezed the vital fluids from them. Appellants specifically accuse defense counsel of lulling plaintiffs into "a belief that this was an acceptable forum" and "participating in pre-trial preparations which it intended to avoid" [sic] and eleventh hour tactics (Appellants' Brief, p. 11). Appellants' counsel

concludes that the order of Judge Lasker was wrong, unjust and inequitable.

Since the commencement of this action in 1971, defendants-appellees have taken the position the plaintiffs' claims are born out of a lack of understanding for international ship chartering and financing and the role of brokers in that community. Brokers always take a risk that deals can fall through at any time, even after lengthy and difficult negotiations. Plaintiffs' complaint involves a speculative shipping opportunity that was never consummated because important terms could not be agreed (A97). Plaintiffs acted for chartering interests in Israel. When the deal was not consummated, no one made money, including defendants, who plaintiffs have selected as the parties responsible for their disappointment. It, therefore, comes as no surprise that their failure to satisfy the District Court that it had jurisdiction takes them to this Appellate Court rather than to the New York State Supreme Court for New York County where they filed an identical complaint against the very same defendants in 1972 for "insurance purposes" (Appellants' Brief, page 9).

In this brief we shall, first of all, restate where necessary the chronology of events in this litigation. In Point I we shall show that the District Court made a timely and correct ruling in denying Stalco's motion to amend its citizenship. In Point II we shall show that Stalco's attempt to amend its citizenship was a hazardous last ditch effort to permit the joinder of an otherwise non-diverse plaintiff. In Point III we shall discuss and refer to the record to show that delay in making a substantial jurisdictional amendment can only be attributed to appellant. In Point IV we shall show that plaintiffs' complaints about the New York State Court action are fabricated and without merit. And in Point V we shall show that plaintiffs' motion to amend their cause of action was properly denied.

The Factual Background

In July, 1971 plaintiffs filed an action in the Southern District of New York (71 Civil 3118) against four defendants who are appellees in this consolidated appeal one of whom, Peraco Chartering Corp., is a New York corporation. Thereafter, in November, 1972, plaintiff-appellant Stalco commenced a separate action (72 Civil 4926) against defendants-appellees Financial Enterprises, Hesnes Shipping and Mr. Arneberg, and at the same time the 1971 complaint was unilaterally amended to drop those parties. A motion was made simultaneously by plaintiffs seeking the Court's sanction of these changes and praying for a consolidation of the two suits. Also in 1972, all three plaintiffs-appellants commenced an action in the New York State Supreme Court for the County of New York (Index no. 20773/72). Each of the three separate complaints had one common thread, i.e., the identical allegation and claim against defendants that they had breached a written letter agreement dated April 25, 1971 (A67, 71 and 72). It is defendants' contention that the letter dated April 25, 1971, was not an enforceable contract and plaintiffs suffered no damages.

It was at a pretrial conference before Magistrate Schreiber in January, 1975, that plaintiffs' counsel first intimated that plaintiffs' cause of action was other than alleged in the several complaints. Magistrate Schreiber directed plaintiffs to move for an amendment of their cause of action after defense counsel protested that altering the bases of the complaints three and one half years after the commencement of the action and after pre-trial discovery had been conducted with a view toward finding the elements of a contract in the letter dated April 25, 1971, would be irreparably prejudicial. Proceeding to trial under a different cause of action would have rendered the pre-trial discovery virtually useless, particularly in view of the fact that the witness who appeared for an oral deposition on behalf of plaintiff MMI had passed away.

The statement at page 2 of appellants' brief that appellants had entered into a joint adventure with de. ants is a conclusory statement. And no motion to amend the complaint to allege a joint adventure has been made in the District Court.

The statement on page 3 of the brief that defense counsel for the first time raised a jurisdictional defense at the January pretrial conference claiming Stalco to be an indispensable party is not supported by the record.

The facts can be found in the motion to amend the complaint made by plaintiffs and returnable on the 21st day of February, 1975 (A58 through A64). Plaintiffs' counsel, Mr. Allen, states that "the present motion became necessary when defense counsel argued before Magistrate Schreiber that (from a narrow interpretation of the complaint) plaintiffs had restricted their cause of action to one specific written document . . ." (A61), whereas plaintiffs wanted to allege an agreement based generally on unspecific "discussions" (A63). Appellants misconstrue the record at the bottom of page 10 of their Brief by construing this amendment as "narrowing" vice "enlarging." No formal allegation has even been made by plaintiffs that their relationship with defendants constituted a "joint adventure." Indeed, unstructured attempts to create a "joint adventure" without specifically alleging the elements of that joint adventure are prohibited as a matter of law, *Yonofsky* v. *Wernick,* 362 F. Supp. 1005 at 1032 (SDNY, per EDELSTEIN, C.J.)

In conjunction with defendants' opposition to plaintiffs' motion to amend the complaint, defendants made a cross motion to dismiss the complaint on several grounds. These were: 1) that the conditions on which the alleged agreement was predicated did not occur; 2) that Stalco International Corporation was not a real party in interest, but rather one Joseph Levy, who was a partner with Messrs. Katz and Shamir, the principals of plaintiff MMI and In-

tercambio as shown in their agreement (A119); 3) that Per Arnstein Arneberg did not participate in the negotiations as an individual; and 4) both actions were irrevocably defective because indispensable parties could not be joined as required by Rule 19, F.R.C.P.

Following an exchange of answering and reply affidavits and briefs on the issues raised by plaintiffs' motion to amend and defendants' cross motion to dismiss, a hearing was scheduled by Magistrate Schreiber to consider the merits of the motion. Hearing was held on May 15, 1975. Stalco's motion to amend its citizenship from New York to California (A126 to A129) was returnable on May 20, 1975. Defense counsel strongly objected to this amendment (A130 to A134) by pointing out all of the instances in the record in which Stalco's attorneys and employees had represented on sworn testimony that Stalco had its principal place of business in New York and that permitting such an amendment was prejudicial to defendants.

It must be noted that the scope of this appeal is quite narrow. Judge Lasker's decision granting the motion to dismiss for lack of indispensable parties (Stalco in 71 Civil 3118 and MMI and Intercambio in 72 Civil 4926) is challenged only in Point III of appellants' brief where the argument is made that the availability of an alternative forum is not relevant. All three appellants participate in the argument set forth in Point IV of appellants' brief concerning their motions to amend the complaint to allege an enlarged set of facts as the bases of their complaints. But the bulk of this appeal is dedicated to the District Court's denial of Stalco's motion to permit Stalco to deny that it was principally located in New York at the commencement of these actions.

The attempt by Stalco to change its citizenship was ironic because by motion dated November 20, 1972, returnable December 22, 1972, plaintiffs' counsel requested the lower Court to certify that Stalco as plaintiff and Financial Enterprises, Hesnes and Mr. Arneberg could be

dropped from the original action and that the new action (72 Civil 4926) could be consolidated with the former. The premise of the motion was that Stalco was principally located in New York; since defendant Peraco was a New York corporation, complete diversity was lacking. The motion papers, including the affidavit of plaintiffs' counsel, Mr. McNamara, are not reprinted in the appendix although the report of Magistrate Raby dated March 27, 1973, and the memorandum of Judge Lasker are reprinted (A28-A30 and A31). The affidavit of Mr. McNamara is annexed at the end of this brief.

POINT I

Stalco's motion to amend the complaint was properly denied.

Three and one-half years after the commencement of the action and after a hearing was held on defendants' motion to dismiss for failure to join an indispensable party, Stalco moved to amend its citizenship.

In *Foman* v. *Davis,* 371 U.S. 178, 9 L.Ed. 2d 222 (1962), the Supreme Court set forth the following view of the oft-stated policy of "liberality of amendment:"

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'

The reasons stated in *Foman* for denying a motion to amend are present in this case: (1) Stalco unduly delayed making the motion for three and one-half years; (2) plaintiff's motive in making the motion was solely to attempt to preserve the subject matter jurisdiction of the District Court even though it had previously attempted to preserve the subject matter jurisdiction by averring that it was a New York citizen; (3) plaintiff's motion supported at the outset only by an attorney's affidavit was not made returnable until after the hearing on defendants' motion to dismiss the claim for lack of indispensable parties; (4) the complaints had been amended twice in the past; (5) the amendment sought to preserve in the Federal Court that which plaintiffs had in the state court, to wit: a forum in which to try the issues; thereby forcing defendants to continue to endure the persecution of defending identical lawsuits in two separate forums.

The decision to permit an amendment is within the discretion of the District Court, *Portsmouth Baseball Corp.* v. *Frick,* 21 F.R.D. 318 (S.D.N.Y. 1958).

Most importantly, it is not in the interest of justice to force defendants to use their time and resources to identify the plaintiff in the Federal Court when the plaintiff is maintaining an identical action against the very same defendants in the State Court. Rule 1, F.R.C.P. provides that these rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

> While leave to amend should be freely given, the time must arrive at some stage of every litigation when plaintiff must be required to stand upon the allegations he is asserting; that time has arrived. *Bernstein* v. *N.V. Nedalandsche-Amerikaansche,* 79 F. Supp. at 42 (SDNY 1948), affirmed in part and modified in part on other grounds 173 F. 2d 71 (2CA 1949).

POINT II

The basis of Stalco's motion to amend is contradicted by its own record.

Appellants' lead off their argument (Appellants' Brief, Point I) by telling this Court that the "facts concerning Stalco's citizenship are not disputed." But this statement cannot shroud the simple truth that Stalco created a record in the District Court which leads to confusing, if not plainly contrary, inferences.

At the top of page 5 of their brief appellants argue that the District Court must only find "proof of substantial supportive evidence to" defeat a pretrial motion for dismissal. It must be noted that defendants have never put into issue the citizenship of plaintiff-appellant Stalco. Stalco itself has put its citizenship in issue. Indeed, through the course of this litigation, Stalco has offered two sets of diametrically opposed facts to the District Court desiring to be entitled to whatever favorable inferences may be drawn from either set of facts. Appellants argue that the affidavit of Mr. Jacobson (A157-A160) is dispositive, although they chose not to submit it until after Magistrate Schreiber had heard argument on the motion, thereby depriving defendants of a fair opportunity for rebuttal. Mr. Jacobson asserts that the affidavit is made to "eliminate any possible contention that diversity jurisdiction does not exist in this action" (A167-8). It must be borne in mind that neither defendants nor the Court raised any specific question about diversity jurisdiction. Indeed, in 1972, Mr. McNamara, plaintiffs' former counsel, had taken careful steps to preserve diversity jurisdiction although in so doing he dropped an indispensable party from 71 Civil 3118 and could not include indispensable plaintiffs in 72 Civil 4926, *Fambrough* v. *Gill Transportation Corp.*, 228 F. Supp. 746 (SDNY 1964). Plaintiff Stalco placed in issue its citizenship for diversity purposes for the self-serving purpose of

persuading the lower Court that the indispensable parties could be joined even though Stalco at all prior times was demonstrably a New York citizen.

Stalco bases its appeal of the lower Court's denial of its motion to amend its citizenship on the language found in 28 U.S.C. § 1653:

> Defective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts.

In invoking this statute, appellants conveniently ignore the fact that their motion to amend dealt with the substance of Stalco's corporate identity and was based on sworn testimony contrary to sworn testimony previously given. The amendment did not, as appellants suggest, merely cure an otherwise defective jurisdictional allegation. The amendment put into issue Stalco's citizenship. § 1653 does not apply to substantive amendments.

> The power of the appellate Court to correct defective jurisdictional defects concerns defects of form, not substance. *Brennan* v. *University of Kansas*, 451 F.2d 1287 (10CA 1971). Also *Smith* v. *Fisher Pierce*, 248 F. Supp. 815 (D.C. Tenn 1965), *Blanchard* v. *Terry & Wright, Inc.*, 331 F.2d 467 (6CA 1964).

Stalco's citizenship became a crucial issue when the District Court found that Stalco, MMI and Intercambio were joint obligees and such, indispensable parties. Plaintiffs allege that they formed an association among themselves called MIMI Group (A6). They do not contest that they are joint obligees and, therefore, indispensable within the meaning of Rule 19 F.R.C.P. (3A *Moore, Federal Practice*, § 19.11 (2d Ed. 1968), *Rosen* v. *Texas Co.*, 161 F. Supp. 55 (SDNY 1958). Appellants do not appeal from the District Court's finding of indispensability. The District Court found that the consolidation of the two actions was a device which did not satisfy the requirement of Rule 19

that indispensable parties be joined, in so far as Rule 82, F.R.C.P. mandates that the rules of Court are not to be construed to extend the jurisdiction of the federal courts.

Having decided that Stalco was an indispensable party, the District Court evaluated the effect of dismissing the action in terms of plaintiffs' argument that the presence of Stalco in a consolidated action removed the potential for prejudice implicit in the elements set forth in 19(b). Consolidation does not change the rights of the parties, 5 *Moore, Federal Practice,* § 44.02 (2nd ed. 1968), and subject matter jurisdiction cannot turn on "the whim of the pleader." *U.S.* v. *Western Pacific RR Co.,* 352 U.S. 59 (1956).

Of course, of paramount importance is the fact that all three plaintiffs had commenced identical litigation in the New York State Court, across the street from the Southern District Courthouse, against all four defendants. Thus, plaintiffs have what they want. Jurisdictional problems are apt to arise when Mexican, Israeli and New York citizens sue Bahamian, Norwegian and New York citizens. But jurisdictional problems in the state action have not arisen. Since plaintiffs had the state action in their back pocket for "insurance purposes," the equities squarely favor defendants, who are defending the same claims in two jurisdictions. The duplicity necessarily increases the time, effort and expense to defendants. Hidden in the legal conundrum is the anxiety to the individual defendant Arneberg who must face two lawsuits alleging over $500,000 in damages against him (A99).

Stalco could not be joined because Stalco had its principal place of business in New York. Since defendant Peraco was a New York corporation, diversity would be defeated by joinder. Questions of indispensability must be addressed before trial, *Bentninck* v. *Guaranty Trust Co. of New York,* 109 F. Supp. 827 (SDNY 1952). Appellants' argument to the contrary (Brief, p. 4) does not recognize this crucial link between Stalco's citizenship and the indispensability question.

Appellants contend that the District Court has a "duty" to permit Stalco's motion to amend (Brief, p. 7). They rely on *Shahmoon Industries, Inc.* v. *Imperato,* 338 F. 2d 449 (3CA 1964). The Third Circuit Court of Appeals has held that *Shahmoon* teaches:

> . . . that an evidentiary hearing may be appropriate [but it does] not hold that such a hearing is always required so long as the court has afforded the plaintiff notice and a fair opportunity to be heard. We will not set aside its reasonable exercise of discretion as to the mode of determination of the jurisdictional facts. (*Tanzymore* v. *Bethlehem Steel Corp.,* 459 F. 2d 1320 at 1323-24 (1972)).

Plaintiff has the burden of proving jurisdictional fact, *Gibbs* v. *Buck,* 307 U.S. 66, 59 S.Ct. 725, 83 L. Ed. 1111 (1939). No solid evidence or documentation was supplied by Stalco to show the Court that all its prior testimony as to principal place of business was incompetent or incredible. It is not the burden of the Court to establish a plaintiff's citizenship, *Tanzymore, supra* at 1324.

Further, appellants' reliance on *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90, 94 S.Ct. 1613 (1974), is not appropriate. There the only pertinent documents before the Court were the complaint and two proclamations issued by respondent, Governor Rhodes of Ohio. No answer had been filed. The Supreme Court stated:

> The primary question presented is whether the District Court acted *prematurely and hence erroneously* in dismissing the complaints on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim. (emphasis added)

In the instant case, plaintiffs had waited three and one-half years to attempt this "minor amendment" (as Stalco's attorney incorrectly characterized it (A99)). But Judge

Lasker agreed with Magistrate Schreiber that the interposition of the motion was "a safety valve" (A148). Moreover, as Stalco's citizenship bears on the jurisdiction *vel non* of the Court, it is quite major. Neither the motion to amend nor the District Court's denial of the motion was premature.

Moreover, it was not erroneous. At the time the motion was made the fact that plaintiff Stalco had its principal place of business in New York was supported by the following:

1) ¶ 1 of Stalco complaint, 71 Civ. 3118 (A4);

2) Plaintiffs' former counsel, Mr. McNamara, by sworn affidavit dated November 20, 1972, stated that Stalco was authorized to do business in New York and had its principal place of business in New York;

3) ¶ 1 of Stalco complaint, 72 Civ. 4926 (A38);

4) Magistrate Raby's report concludes that Stalco was a New York citizen for diversity purposes (A28);

5) Petition by Stalco in New York Supreme Court in unrelated action dated August 3, 1972 (A135);

6) ¶ 1 of Stalco complaint paralleling Federal actions filed in New York State Supreme Court on or about August 24, 1972 (A132-133);

7) Stalco's employee, Mr. Goldberg, upon oral deposition on December 13, 1971 (A133);

8) ¶ 2 of Goldberg affidavit dated March, 1975 (A106).

The anomaly of Stalco's efforts to amend its citizenship is that Mr. McNamara prudently attempted to preserve the District Court's subject matter jurisdiction back in

1972 by dropping parties, commencing a new action and consolidating, all because Stalco was a New York citizen. But three years later plaintiff Stalco, represented by the same law firm, but with a different attorney, has attempted to preserve the subject matter jurisdiction of the District Court by asserting that Stalco was not a New York, but solely a California, citizen for diversity purposes. In an affidavit sworn to on the 20th day of November 1972, Mr. McNamara stated that he felt that there was merit to defendants' affirmative defense that the Court might lack subject matter jurisdiction. Being sensitive to this weakness, he took corrective action to "drop and amend" (this affidavit is annexed to this Brief in the Appendix). In his affidavit Mr. McNamara states, "Stalco is a California corporation authorized to do business in New York State and has its principal place of business in New York City." Three years later Stalco attempted to persuade the District Court that Mr. McNamara's sworn statement was incorrect, that his belief that the Court might lack subject matter jurisdiction for lack of diversity was completely erroneous, and that Mr. McNamara, despite the fact that he went to all of the trouble to realign the parties and commence a new action, had not done any research or investigation to support the accuracy of his sworn testimony.

To minimize the anomaly, appellants suggest that Mr. Goldberg, who appellants claim was neither an officer nor director of Stalco, was the only contact Stalco's attorney had with Stalco (Brief, page 5), although he is referred to as Stalco's president in the initial complaint (A6). But it is not easy for us to see how an employee who had authority to initiate $700,000 lawsuits would not know his employer's principal place of business. It is not easy for us to believe that Stalco's former counsel would have worked so hard in 1972 to preserve the District Court's subject matter jurisdiction without a little research into the basic facts. It is not easy for us to conclude that the unequivocal allegations of citizenship in the unrelated New

York State Court petition (A135) were based on the same sources, to wit; Mr. Goldberg (see Appellant's Brief, Page 6, ¶ 4). Appellants draw precisely such difficult inferences without reference to any support in the record. It was exclusively their prerogative and burden to inject such support but none was provided.

It is true that the affidavit of Mr. Jacobson was finally introduced after the hearing on the motion to amend, the hearing on defendants' motion to dismiss and Magistrate Schreiber had published his report. Originally, the sole support for the Stalco motion was the attorney's affidavit (A127 to A129).

But Mr. Jacobson's affidavit provided too few solid facts, too late. His language is conclusory and self-serving.

He does not dispute that Stalco was a New York citizen at the commencement of the action. In paragraph 2 of his affidavit (A158) he states that Stalco was a Whittaker Division operating in New York from mid-1970 to mid-1971. He does not explain how a non-existent entity known as Stalco International Corporation could have petitioned the New York State Supreme Court in August, 1972, representing that it was a corporation located in New York City. He does not explain how Mr. Goldberg upon oral deposition on December 13, 1971, could have given sworn testimony that Stalco's offices were located at 110 East 59th Street (A133), New York City, while Mr. Jacobson states that Stalco ceased doing business on August 10, 1971. He does not explain how an employee of Mr. Goldberg's rank could have been so ignorant.

Finally, Mr. Jacobson never really tells us who the plaintiff is. His summary in paragraph 7 (A159-60) gives the Court and the defendants an option of picking either "Stalco 2" or "Stalco 3" with the qualification that if the Court picks "Stalco 2" it must on its own initiative further amend the complaint to denominate Stalco as *"Stalco International Company,* a Division of Whittaker Corporation."

The affidavit of Mr. Jacobson raises more questions than it answers and in effect does not actually purport to answer any questions insofar as it leaves the final decision to the Court. It is most difficult for the defendant to properly defend itself when the plaintiff is ambivalent about its own identity. It is one thing for a plaintiff to correct a formal defect in its pleading by amendment but it is an entirely different matter for a plaintiff to seek by amendment to reverse a position which it staunchly maintained in various stages of the proceedings over a period of three and one-half years, *Keene Lumber Co.* v. *Leventhal*, 165 F.2d 815 (1CA 1948). In *Walder* v. *Paramount Publix Corporation*, 135 F. Supp. 228 (SDNY 1955) Judge Weinfeld held:

> . . . but to allow this amendment [to plead an oral assignment] which flies in the face of prior positions and sworn statements of the individuals who now seek leave to amend, would not promote the interests of justice, but on the contrary, would serve to encourage endless litigation.

POINT III

Appellants cannot shift the responsibility of their failure to demonstrate diversity jurisdiction in the District Court.

The issue of Stalco citizenship has been raised twice in this litigation—both times by plaintiffs-appellants. The first time the issue was raised, plaintiffs' then counsel Mr. McNamera attempted to cure the lack of diversity jurisdiction by bifurcating 71 Civil 3118 and commencing 72 Civil 4926. These actions could have been consolidated but plaintiffs did not settle an order as directed by Judge Lasker in his memorandum decision dated April 6, 1973 (A31). Technically, no responsive pleading became due.

The issue of Stalco's citizenship was raised again more recently by Stalco in May, 1975, again in an effort to cure a fundamental defect in the structure of the case, this time under Rule 19. Defendants' motion for dismissal for failure to join indispensable parties was timely by virtue of Rule 12 (h)(2) FRCP.

Contrary to the statement made in Point II of Appellants' brief, the issue of Stalco's citizenship was not raised at the pretrial conference before Magistrate Schreiber in January, 1975. In the motion papers prepared by appellants following that conference, no mention is made of Stalco's citizenship (A58-A64).

The citizenship issue was, in fact, first raised in appellant's motion papers dated May 7, 1975 (A126-A129). And contrary to appellants' statement at the top of page 9 of their Brief that they acted with dispatch by producing the so-called "definitive" affidavit of the Vice-President, the affidavit was not produced until sometime after September 17, 1975 (A160) and after Magistrate Schreiber had considered the motion papers. No concrete evidence was submitted to support the motion.

Aside from the inaccuracies that color the argument made by appellants in Point II of their Brief, the argument itself is specious. Jurisdictional defenses don't "lurk" as appellants suggest. Rule 12(h)(3) FRCP expressly provides:

> *Whenever* it appears by *suggestion* of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the *action.* (Emphasis added)

Defendants are not responsible for jurisdictional defects and cannot be blamed for plaintiffs' delays in attempting to show jurisdiction. Appellants argue that:

> Plaintiffs' allegations remain unchanged, i.e. that there is and always has been diversity jurisdiction (Brief, page 9)

But the record clearly contradicts this statement. In reporting on plaintiffs' motions to amend back in 1973, Magistrate Raby concluded at the urging of plaintiffs' counsel, Mr. McNamara, that:

> . . . there is a failure of diversity in this case. (A27-A28)

The prejudice generated by plaintiffs' problems harms defendants not plaintiffs. Defendants are entitled to know who is suing them and on what grounds. Plaintiffs have not maintained a straight or consistent course in either regard. The cost and effort of defending a case of this magnitude in one Court is onerous enough, but defendants have been unmercifully compelled to defend not only in the Federal Court, but also in the State action.

POINT IV

Plaintiffs are not prejudiced by a dismissal of the actions because the same parties are before the New York State Supreme Court where plaintiffs recently amended their complaint.

Rule 19(b) allows a district court to look to the availability of an alternative forum for providing an adequate remedy in determining whether to dismiss an action for lack of an indispensable party. This rule adequately refutes appellants' unqualified argument in Point III of their brief that:

> We submit that the availability of another forum should have no bearing on whether or not there is proper jurisdiction in this Court.

Appellants and their counsel may rest assured that defendants do not regard the State Court action as "illusory." And we submit that appellants do not either. On August 6, 1975, they served amended complaints in the State Court action on all four of the defendants which were not part of the record in the District Court. Appellants clearly are cashing in on their "insurance."

Since the damages alleged in both actions arose out of the same operative facts, it is unclear why the discovery taken in the Federal action is of no use to the plaintiffs as they suggest. We respectfully submit that plaintiffs' inability to profit from the pre-trial discovery already conducted should not be the concern of this Court. Furthermore, appellees know of no essential witnesses who are now "either dead or beyond the subpoena power of state court" and who are, nevertheless, any more available to the Federal Court.

In sum, appellants alone have the power to make the state court action "illusory." But in so doing, they do not expand the jurisdiction of the Federal District Court.

POINT V

No joint venture has been alleged and the District Court's denial of the motion to amend the bases of plaintiff's claim was correct.

Judge Lasker held that plaintiffs' motion to amend the allegations of facts upon which their claim was based was moot because of the dismissal of both actions for failure to join indispensable parties.

Appellants assert a conditional appeal of this ruling, wherein they claim if Judge Lasker meant something more by his denial by reason of mootness, he was in error (Appellants' Brief, page 10). Judge Lasker's holding seems plain enough (A168-A169). But appellees are con-

strained to make a few notes concerning appellants' Point IV.

First, the record clearly shows that plaintiffs have not made a motion to amend so as to allege a "joint venture."

The proposed amendments appear at A63-A64 where it is graphically obvious that "joint venture" is not mentioned.

Secondly, the proposed amendments do not by their terms narrow the claim against defendants but rather enlarge it to include "discussions" leading up to the preparation of the letter dated April 25, 1971, which was previously the sole basis of the complaint (A63-A64).

The discovery which had been conducted by defendants had not contemplated such an unlimited ground for plaintiffs' claim (A66 to A69).

Finally, Magistrate Schreiber directed plaintiffs to make this motion (A61 & A69) to enable defendants to know the nature of the claim against them. Defendants vigorously opp ed the motion to amend by applying the standards set forth by the Supreme Court in *Foman* v. *Davis, supra.*

Conclusion

Throughout this Brief an effort has been made to set the record straight. This has been necessary because of the all too frequent lapses of accuracy in appellants' characterization of what has transpired at the District Court level. In the final analysis, the record speaks for itself. Plaintiff Stalco waited three and one half years to amend its allegation of citizenship and supported that motion with non-specific conclusory affidavits, two filed after the hearing on the motion. No effort was made to explain the prior inconsistent sworn testimony by their counsel and by Stalco's representative, other than to suggest that they were ignorant all the while. Despite this pattern of in-

consistency, the only result of the dismissal of the actions is that plaintiffs may prosecute their claim in the State Court. The order of the District Court dismissing the action was proper under the Federal Rules of Civil Procedure and should be affirmed.

Respectfully submitted,

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APPELLEES' APPENDIX

Notice of Motion to Drop Parties Under F.R.C.P. Rule 21, to Amend the Complaint Under F.R.C.P. Rule 15 and to Consolidate Under F.R.C.P. Rule 42.

UNITED STATES DISTRICT COURT

71 Civil 3118

SOUTHERN DISTRICT OF NEW YORK

STALCO INTERNATIONAL CORPORATION, MMI LIMITED and INTERCAMBIO COMERCIAL KATZ Y ARSARAZ, S.A.,

Plaintiffs,

—against—

PERACO CHARTERING CORPORATION, FINANCIAL ENTERPRISES OF THE BAHAMAS LTD., HESNES SHIPPING, A.S., and PER ARNSTEIN ARNEBERG,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the pleadings in this case and the annexed affidavit of Francis H. McNamara sworn to on the day of October, 1972 a motion will be made before the Honorable Morris E. Lasker in Room 2903 of the United States Federal Court House located at Foley Square on the 22nd day of December, 1972 at 2:00 in the afternoon of that day, or as soon thereafter as counsel can be heard for the following relief:

1. An order pursuant to Rule 21 of the Federal Rules of Civil Procedure dropping plaintiff Stalco International Corporation and defendants Financial Enterprises of the Bahamas Ltd., Hesnes Shipping

Notice of Motion to Drop Parties Under F.R.C.P. Rule 21, to Amend the Complaint Under F.R.C.P. Rule 15 and to Consolidate Under F.R.C.P. Rule 42.

A.S. and per Arnstein Arneberg from the within law suit;

2. an order pursuant to Rule 15 of the Federal Rules of Civil Procedure permitting amendment of the complaint in this action to conform to the relief sought above;

3. an order pursuant to Rule 42 of the Federal Rules of Civil Procedure consolidating the within action with 72 Civil 4926, a related case now pending before this court;

and for such other and further relief as to the court may seem just and proper.

Dated: New York, New York
November 20, 1972

CICHANOWICZ & CALLAN

To: DONALD F. MOONEY, Esq.
Attorney for Defendants

Affidavit of Francis H. McNamara.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANCIS H. MCNAMARA, being duly sworn deposes and says:

That he is an attorney associated with the law firm of Cichanowicz & Callan, attorneys for plaintiffs herein, and that he makes this affidavit in support of plaintiffs' motion for the following relief:

1. An order pursuant to Rule 21 of the Federal Rules of Civil Procedure dropping plaintiff Stalco International Corporation and defendants Financial Enterprises of the Bahamas, Ltd., Hesnes Shipping A.S. and per Arnstein Arneberg from the within law suit;

2. an order pursuant to Rule 15 of the Federal Rules of Civil Procedure permitting amendment of the complaint in this action to conform to the relief sought above;

3. an order pursuant to Rule 42 of the Federal Rules of Civil Procedure consolidating the within action with 72 Civil 4926, a related case now pending before this court.

On July 19, 1971 summons' and complaints (copies of which are annexed hereto as Exhibits "A-1" and "A-2")

were served upon the five defendants herein at the offices of Peraco Chartering Corporation in New York City alleging breach of a brokerage contract. Thereafter defendant Flanigan Loveland, S.A. moved to dismiss the complaint on the ground that the court did not have in personam jurisdiction. The plaintiffs entered into a stipulation with the defendant Flanigan Loveland, S.A. dismissing the suit against it without prejudice and this stipulation was so ordered by the Clerk on September 27, 1971.

Defendants Peraco and Arneberg appeared in the action on August 3rd, 1971 by their attorney Donald F. Mooney, and on August 6, 1971 Mr. Mooney entered an appearance on behalf of Financial and Hesnes. Thereafter, numerous extensions of time to answer were granted to the defendant.

On August 25, 1971 defendant Peraco served notices to take the depositions of all three plaintiffs. The depositions of Intercambio by Marcos David Katz, MMI by Hayman Shamir and Stalco by Mordechai Goldberg were taken by the defendant Peraco on respectively, October 13, 1971, November 24, 1971 and December 13, 1971. During this time defendant Peraco had received a notice of deposition from the plaintiffs and the deposition of this party by Arneberg, its president, was taken on December 16, 1971. The deposition of Mr. Samuel Loveland, Jr. as a witness was taken on March 2, 1972, this latter examination being the last discovery proceeding taken to date.

On December 8, 1971, defendant Financial and Hesnes served answers upon the plaintiffs and raised the defense that the court lacked subject matter jurisdiction of the action. On January 26, 1972 defendant Arneberg answered the complaint and on February 11, 1972 the remaining defendant, Peraco, served its answer and alleged that the court lacked subject matter jurisdiction of the suit. Thus,

the only defendant which has not raised the defense of lack of subject matter jurisdiction is Arneberg. It should be noted that Peraco has also instituted a counter claim in the amount of $75,000.00 against all plaintiffs.

Respondent has reviewed the merits of the subject matter jurisdiction defenses raised by three of the four defendants and has become convinced that they may have merit. Accordingly, in order to avoid any difficulty with the court's jurisdiction and preserve the effectiveness of the extensive pre-trial work done in this case deponent now moves that certain parties be dropped from this case. If such an order is granted there would be no question that the court has subject matter jurisdiction of the action.

It is requested that plaintiff Stalco be dropped from this suit. Stalco is a California corporation authorized to do business in New York State and has its principal place of business in New York City. Under 28 U.S.C. 1332 and the complete diversity rule Stalco could not maintain an action in the Federal Court against Peraco, a New York corporation, on the grounds of diversity. Similarly, plaintiffs MMI and Intercambio being, respectively, an Israeli and Mexican corporation, as aliens, cannot maintain a suit against Financial, Hesnes and Arneberg, the first two being corporations existing under the laws of the Bahamas and Norway and the last defendant being a citizen of Norway. Federal diversity citizenship does not exist, as this court well knows, in cases between aliens.

Consequently, it is requested that Stalco, a plaintiff, and Financial, Hesnes and Arneberg, defendants, be dropped from this suit. That will leave only MMI and Intercambio as plaintiffs (two alien corporations) and Peraco, a New York corporation, in the suit and diversity will this be satisfied since the amount in controversy exceeds $10,000.00.

Trial of the subject matter of the action will not be disturbed by removal of these parties. None of them are indispensable insofar as complete justice can be done between

the remaining parties in their absence and none of the removed parties will be prejudiced by their absence.

The complaint herein alleges a contract between the three plaintiffs on the one hand and the four defendants on the other, and the breach thereof by the defendants. The liability of the defendants, when proven, will be joint and several since the association each side formed was in the nature of a partnership. That is, every defendant would be liable to every plaintiff for the full proven liability. Naturally, no double recovery would be sought. Consequently, the removal of one plaintiff and three defendants would not detract from the integrity of the cause of action of the remaining two plaintiffs against the single defendant Peraco.

As the annexed complaint alleges, the three plaintiffs and four defendants formed single contracting groups or units among themselves, the plaintiffs being known as MMI group and the defendants being led by Arneberg who controlled the three defendant corporations. The two groups agreed that they would effect charter of the M/V WARWICK FORT to an Israeli charterer, MMI group providing the offer from the charterer with the Arneberg unit acquiring the vessel and making her available for charter. The complaint goes on to allege that MMI group produced a suitable offer but Arneberg and his group of companies failed to acquire or present the vessel for charter. The liability which arises from this breach of contract is joint and several. Each of the plaintiffs in MMI group has a good cause of action for full damages against each of the defendants in the Anreberg unit. Full recovery by any one plaintiff against one defendant would preclude further action since the plaintiff will not and could not seek multiple dollar recovery. In this sense the dropped parties are not indispensible to the maintenance or the validity of the lawsuit between MMI, Intercambio and Peraco and complete jus-

tice can be done between those parties in the absence of the others.

Neither will the dropped parties be prejudiced by their absence from the suit. A judgment in favor of MMI and Intercambio would not be *res adjuidicata* against them in another suit and plaintiffs will not seek double recovery. Further, since Arneberg controls all defendants the absence of certain defendants will only have technical meaning. Finally, the court can see from the third item of relief requested that the four dropped parties will in a real and substantive sense still be in the suit. Plaintiffs have asked that the complaint filed under 72 Civil 4926, which has Stalco as plaintiff and Financial, Hesnes and Arneberg as defendants, which represents a separate cause of action, be consolidated with the within law suit for all procedural and trial purposes. The two lawsuits will be separate only for purposes of jurisdiction. All parties will be before the court at one time in one proceeding and full justice will be efficiently served.

Deponent respectfully requests that the relief prayed for be granted and that the within proposed order be signed.

(Sworn to by Francis H. McNamara, November 20, 1972.)